UNITED STATES OF AMERICA
v.
HERBERT H. MULLIN,
PEARL F. MULLIN,
C. A. GUSSMAN

IBLA 70-378 Decided April 7, 1971

Mining Claims: Discovery: Generally

The mere presence of slight amounts of gold on a placer mining claim located for gold does not satisfy the requirement of the discovery of a "valuable mineral deposit" under the mining laws where it is shown that the amount of gold present is extremely limited and would not warrant a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in developing a paying mine.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners, and an examiner has no duty either to rehabilitate discovery points or to explore beyond the current workings of the mining claimant in an effort to verify a purported discovery.

Administrative Practice -- Administrative Procedure Act: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the Administrative Procedure Act and its requirements of separation of function in decision making and do not deny due process.

UNITED STATES OF AMERICA, Contestant	:	S 2348
v.	:	Placer mining claim declared null and void
HERBERT H. MULLIN, PEARL F. MULLIN, C. A. GUSSMAN, Contestees	:	Affirmed

DECISION

Hubert H. Mullin, Pearl F. Mullin and C. A. Gussman have appealed to the Director, Bureau of Land Management 1/ , from a decision dated September 16, 1969, in which a hearing examiner declared the Hopeful placer mining claim null and void because no valid discovery had been demonstrated and the land embraced by the mining claim was found to be nonmineral in character.

The Hopeful placer mining claim embraces the S 1/2 S 1/2 S 1/2 sec. 10, T. 40 N., R. 9 W., M.D.M., Siskiyou County, California, within the Klamath National Forest. The claim was located July 14, 1948, by Shirley F. Baker, Thelma Baker, Patty Patterson and Wayne McClain.

Upon the recommendation of the Forest Service, U.S. Department of Agriculture, a contest complaint was filed which charged (1) there is not disclosed within the boundaries of the

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1/ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

mining claim mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery, and (2) the land embraced within the claim is nonmineral in character. A hearing was held at Yreka, California, on May 20, 1969, for the purpose of receiving testimony and other evidence bearing on the validity of the mining claim. The contestant was represented by the Office of the General Counsel, U.S. Department of Agriculture; the contestee appeared without counsel.

The Government's case at the hearing consisted of testimony from Minter E. Harris, a mining engineer employed by the Forest Service. Mr. Harris testified that he had discussed the Hopeful mining claim with C. A. Gussman, one of the contestees, but his examination of the claim in August 1968 was conducted when none of the claimants were present. His examination consisted of sampling the gravels and comparing his results with those of a Mr. Sanborne, a Forest Service employee, who had made a similar examination of the Hopeful placer mining claim in April 1953 in connection with mineral patent application Sacramento 043682. Harris stated the patent application had been withdrawn because sufficient mineral values could not be shown. He states his samplings produced values within the same range as those reported by Sanborne, although Sanborne had one sample with much higher values than any he had found. Harris submitted no figures, but gave his estimate that the gold content of the Hopeful mining claim would be less than 10 per yard, whereas a profitable operation would require gravels in the value range of from $1.50 to $2 per yard. He stated that gravels on the claim are thin and are mostly angular material instead of washed gravels. He indicated that he took about 25 to 30 pans of material from along the creek, and also that he had examined all the mineral exposures on the claim. In his opinion, a prudent man would not be justified in expending time and money in expectation of developing a paying mine.

On behalf of the contestees, Gussman exhibited specimens of gold and assay certificates showing values of gold, silver and copper. He acknowledged that the samples had not come from the Hopeful mining claim, but rather from other claims in the vicinity. He stated that he had taken a composite sample of about 40 pounds from the Hopeful mining claim and had the sample subjected to a fire assay by the Twining Laboratory. The resultant certificate indicated a value of $2.45 per ton for gold and 20 for silver. Gussman admitted that while in some places on the claim the gravel would run over $1.50 per yard, there were other places where it would not run as much as 25 per yard. He stated that, essentially, he was just prospecting the claim to see what might be there.

On reexamination, Harris testified that a fire assay is usually very inaccurate in determining gold values in placer samples because of the manner of occurrence of the gold. He said the customary methods of testing such placer samples is to remove the gold by amalgamation and weigh it separately. Then the remaining material, including very fine gold, black sand or other matter, could be subjected to a fire assay to see what other mineral values might be present.

After summarizing the evidence and the applicable law, the hearing examiner concluded there had been no valid discovery on the Hopeful placer mining claim as required by the mining law.

The appellants contend the hearing examiner's decision is contrary to law and to fact, alleging that the hearing did establish that a discovery had been made.

The establishment of a valid placer mining claim is contingent upon the discovery of "valuable mineral deposits" in a form other than a vein or lode. 30 U.S.C. §§ 22, 35 (1964). Under the mining laws, one may take possession of vacant land open to mineral location and retain possession against all, except the Government, while in diligent persecution of efforts to discover valuable minerals therein. However, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain possession. United States v. Everett Foster et al., 65 I.D. 1 (1958), aff'd in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

In determining if there has been a discovery of a valuable mineral deposit the Department has consistently adhered to the "prudent man test" first enunciated in Castle v. Womble, 19 L.D. 455 (1894) 2/ , and approved in Chrisman v. Miller, 197 U.S. 313 (1905), and more recently in United States v. Coleman, 390 U.S. 599 (1968).

2/ . . . [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. . . . 19 L.D. at 457.

Within the "prudent man rule" there is also the concept of marketability of the mineral deposit, that in order to establish a discovery of a mineral it must be shown that the mineral can be extracted, removed and marketed at a profit. As the Supreme Court stated in Coleman, supra:

> Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. (footnote omitted) The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used . . . merely recognizes this fact. 390 U.S. at 602, 603.

The Department recognizes a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows the latter that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Converse, 72 I.D. 141 (1965), aff'd in Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 399 U.S. 1025 (1969); United States v. Clyde Raymond Altman and Charles M. Russell, 68 I.D. 235 (1961).

When the Government contests a mining claim on public land it undertakes to show that the discernible evidence of mineralization on the claim is insufficient to constitute a discovery. The Government is not obligated to provide affirmative proof that the land within the mining claim is nonmineral or that no discovery has been made. The function of the Government is one of investigation for purposes of

identifying, if possible, the claimed discovery. If the Government's examiner testifies that he examined the mining claim and found no workings or evidence of valuable mineral deposits, the Government has established a prima facie case. United States v. Lawrence W. Stevens, 76 I.D. 56 (1969); United States v. Bryan Gould, A-30990 (May 7, 1969); United States v. Frank Coston, A-30835 (February 23, 1968). It is the duty of the mining claimant to keep discovery points available for inspection by the Government's mineral examiner, and the examiner has no duty to rehabilitate discovery points or to explore beyond the current workings of the mining claimant. United States v. Bryan Gould, supra.

The testimony of the Government's expert witness that he sampled gravels throughout the claim and from the showings therein estimated the gold content would be less than 10 per yard for the graveled area of the claim, together with his opinion that no profitable operation would be possible on gravels having less value than $1.50 per yard, is sufficient to establish a prima facie case of no discovery. United States v. Bryan Gould, supra.

This testimony of the Government's witness could have been rebutted simply by showing what had been missed in his examination. There was no such rebuttal. Gussman testified that he had taken one composite 40-pound sample from throughout the claim and a fire assay thereof showed a value of $2.45 per ton or more than $4 per yard, but he also stated that while some of the placer materials on the claim would run over $1.50 per yard, there were others which would not make 25 per yard. He admitted he was essentially engaged in prospecting and did not suggest that he had found any mineral values which could be produced profitably. It is unnecessary to analyze further the contestees' evidence. At best they have found only scattered small values. The showing of isolated bits of mineral is insufficient to establish a discovery on a lode mining claim. United States v. Robert Hight and R. L. Coons, A-30256 (April 21, 1965).

Finally, we conclude that the decisions below properly held that there was no valid discovery on the Hopeful placer mining claim as required by the mining law.

The appellants' attack upon the procedure followed by the Department in the adjudication of the contest is without merit. The authority of the Department of the Interior to determine the validity

of a mining claim in an administrative proceeding is well established. The Secretary has been granted plenary power in the administration of the public lands. Until issuance of a patent, legal title to a mining claim remains in the Government, and the Department has the power, after proper notice and upon adequate hearing, to determine the validity of a mining claim. Due process in such a case implies notice of a hearing, but it does not require that the hearing be in the courts, or forbid an inquiry and determination by this Department. Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964); Converse v. Udall, supra. The appellants' charge that they have been deprived of property without due process of law is entirely without merit.

Careful review of the entire record in this case indicates that the hearing under consideration was held in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. § 556 (Supp. V, 1969); that the hearing examiner who presided at the hearing was qualified and had been appointed in accordance with the provisions of 5 U.S.C. § 3105 (Supp. V, 1969), that the decision declaring the Hopeful placer mining claim null and void was based on substantial evidence submitted at the hearing, and that there was no error in the conduct of the proceedings in this case or in the decision declaring the mining claim null and void. Review of the entire record by the Department is within the purview of agency authority to review any hearing examiner decision. 5 U.S.C. § 557 (Supp. V. 1969). The procedure followed by the Department in initiating, prosecuting and deciding contests in mining cases does not violate 5 U.S.C. § 554 (Supp. V, 1969), which forbids those engaged in investigative or prosecuting functions to participate or advise in the decision. For a full discussion See United States v. Frank and Wanita Melluzzo, 76 I.D. 160, 180-181 (1969).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Francis E. Mayhue, Member

Anne Poindexter Lewis, Member.